UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

HOME MAID BAKERY, INC.

Employer

and

Case 37-RD-406

MELBA V. MACHACON, An Individual

Petitioner

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

The Employer, Home Maid Bakery, Inc., is engaged in the retail business of selling baked goods at its facility in Wailuku, Maui, in the state of Hawaii. The Union was certified in December 2002, in Case 37-RC-4032[1] as the collective-bargaining representative of employees of the Employer in the following unit:

> All full-time and regular part-time production employees, bakers, cake preparers, delivery drivers, dishwashers, packers, sushi preparers, cashiers, and janitors, but excluding all other employees including department heads, managers, supervisors, confidential employees, consultants, contracted laborers, student help, guards and/or watchpersons as defined in the Act.

[1] I take administrative notice of a copy of the Certification of Representative issued on December 16, 2002, in Case 37-RC-4032, a copy of which is attached hereto.

Melba V. Machacon, the Petitioner, filed a petition in the instant case with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union and causing a hearing to be held before a hearing officer of the Board. The only issues raised at the hearing were whether the petition should be dismissed because Machacon is a supervisor under Section 2(11) of the Act or because she is not a regular full or part-time employee. I have considered the evidence adduced during the hearing and the arguments advanced by the parties and, as explained below, I find that the petition should not be dismissed.

FACTS

Machacon[2] worked for the Employer as a production employee operating the fryer until about September 19, 2005, at which time she went on a temporary disability leave and underwent surgery for carpal tunnel syndrome. She was on temporary disability leave at the time of the hearing in this case and was receiving State Temporary Disability Insurance (TDI) benefits.[3] She receives medical benefits through her husband's insurance plan and is not insured through the Employer. She has remained on the Employer's payroll records and she testified that she will return to work as soon as her doctor provides her with a medical release.

Prior to her surgery, Machacon worked from 5 p.m. to 11 or 12 p.m. Only three employees, including Machacon, worked in the "back production area" of the Employer's facility during the hours that Machacon worked. Only one of these employees worked with Machacon in the fryer department. The back production area includes the fryer department and the cake preparation area.

[2] Melba Machacon was the only witness to testify at the hearing.

[3] The petition in the instant case was filed on September 28, 2005.

According to Machacon, the back production area is overseen by Supervisors Mary Jane Nativadad and Estrella (last name not disclosed). Estrella leaves work at about 6 or 7 p.m., and Nativadad does not arrive at work until about 11 p.m. Machacon testified that before Estrella leaves work each day, she provides Machacon and the other employees with work instructions. Machacon's work is also overseen by Kitchen Supervisor Cabating Remy. The record does not disclose Remy's work hours.

According to Machacon, she has no authority to assign work, to transfer or to inspect the work of other employees and she does not do so. She further testified that both she and her co-worker in the fryer department know their jobs and require no directions in order to perform their work. She testified that she has told other employees to clean up and throw out rubbish, which are part of their job duties.

Machacon notifies the Employer if she is going to be late arriving to work. According to Machacon, other employees must do the same but they do not notify her. According to Machacon, she is not authorized to make her own schedule or to authorize time off or overtime for herself or for other employees. There are no substitutes for Machacon or her co-worker in the fryer department when they are absent.

On one occasion, Machacon trained a new employee how to use the fryer, but she was not involved in evaluating or disciplining him. Nor has she been involved in evaluating or disciplining any other employees.

Machacon once recommended to the Employer's office manager that the Employer hire her sister-in-law and informed the office manager that her sister-in-law was a hard worker who had been employed for several years for a company that had closed down. The Employer hired Machacon's sister-in-law about two or three weeks later. The record discloses no further evidence

regarding the Employer's decision to hire Machacon's sister-in-law and there is no evidence that Machacon was ever involved in the hire of any other employee.

The record contains no evidence that Machacon substitutes for any supervisor or has a supervisory title or higher pay or different benefits from any other employees.

ANALYSIS

Whether Machacon is a Statutory Supervisor. The term "supervisor" is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993); *International Center for Integrative Studies*, 297 NLRB 601 (1990). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by

tangible examples to establish the existence of such authority." *Oil Workers v. NLRB,* 445 F.2d 237, 243 (D.C. Cir. 1971). Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, the record does not show that Machacon possesses any supervisory authority. Thus, her recommendation to the Employer that her sister-in-law be hired, standing alone, is insufficient to warrant a finding that she is a statutory supervisor. Not only did this involve an isolated situation involving a relative of Machacon's, but there is also no evidence to show what role, if any, her recommendation actually played in the Employer's decision to hire her sister-in-law. See *Custom Mattress Manufacturing, Inc.*, 327 NLRB 111 (1998); *World Theatre Corp*., 316 NLRB 969 (1995). Nor does the isolated example of Machacon training an employee support a finding of supervisory status. The Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, *The Washington Post Co*., 242 NLRB 1079, 1084 (1979) and cases cited therein. Likewise, I do not find that the fact that Machacon has told other employees to clean up is sufficient to establish her supervisory status in the absence of any evidence that the assignment of work is a regular part of her job duties or that disobeying her instruction carries any ramifications for her fellow employees.

In sum, the record shows only that Machacon is a regular production employee and not a statutory supervisor. Accordingly, I refuse to dismiss the petition based on this argument by the Union.

Whether Machacon is an Employee Under the Act. The Union also contends that the petition must be dismissed because Machacon is not an employee under Section 2(3) of the Act because she has not been at work since September 19, 2005, and has been on temporary disability status. The Petitioner and the Employer take the opposite position.

It is well settled that an employee on leave of absence continues to be deemed an employee, absent objective evidence that the employment relationship has been severed. *Detroit Paneling Systems, Inc*., 330 NLRB 1170, 1171 (2000); *Supervalu, Inc*., 328 NLRB 52 (1999); *Pepsi-Cola Co.*, 315 NLRB 1322 (1995); *Red Arrow Freight Lines*, 278 NLRB 965 (1968).

The record shows that Machacon was working for the Employer until her surgery for carpal tunnel syndrome on about September 19, 2005. She has been on temporary disability leave since that time and will return to work when her doctor gives her a medical release to do so. There is no evidence that she has been terminated or has quit her job. Thus, there is no evidence to show that her employment relationship has been severed.

Accordingly, I refuse to dismiss the petition based on this argument.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[4]

3. The Union, International Longshore and Warehouse Union, Local 142, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.[5]

4. The Petitioner asserts that the Union is no longer the bargaining representative of the employees as defined in Section 9(a) of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

6. I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:[6]

> All full-time and regular part-time production employees, bakers, cake preparers, delivery drivers, dishwashers, packers, sushi preparers, cashiers, and janitors, but excluding all other employees including department heads, managers, supervisors, confidential employees, consultants, contracted laborers, student help, guards and/or watchpersons as defined in the Act.

DIRECTION OF ELECTION

[4] As noted above, in Case 37-RC-4032, the Union was certified in the same unit that is the subject of the decertification petition in the instant case. In that case, the Employer and the Union stipulated that the Employer was engaged in commerce under the Act and that the Board had jurisdiction over the Employer. There is no evidence that the Employer's revenues have declined since the proceeding in Case 37-RC-4032.

[5] The Union and the Employer stipulated that the Union was a labor organization under the Act in Case 37-RC-4032.

[6] This unit is appropriate because it is coextensive with the unit that was certified in Case 37-RC-4032. *Campbell's Soup Co*., 111 NLRB 234 (1955).

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of

voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Subregion 37, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii 96850, on or before **February 21, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (808)541-2818. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact Subregion 37.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed.

Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D. Notice of Electronic Filing

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 28, 2006**. The request may not be filed by facsimile.

DATED at San Francisco, California, this 14th day of February 2006.

/s/ *Olivia Garcia*

Olivia Garcia, Acting Regional Director
National Labor Relations Board
Region 20
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